IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

HHCS PHARMACY, INC. d/b/a FREEDOM PHARMACY, Plaintiff, v. EXPRESS SCRIPTS, INC., Defendant.	)	Case No. 4:16-cv-1169 CEJ

FIRST AMENDED COMPLAINT
FOR INJUNCTIVE RELIEF AND OTHER RELIEF

Plaintiff HHCS Pharmacy, Inc., d/b/a Freedom Pharmacy ("Freedom Pharmacy") by its undersigned attorneys amends its Complaint against Defendant Express Scripts, Inc. ("ESI") with the addition of Count VII and Count VIII as follows:

Nature of the Case

1. This case arises out of ESI's unlawful attempt to terminate Freedom Pharmacy from its network of pharmacies effective July 18, 2016. ESI's termination is baseless and improper.

2. ESI has not identified any facts that would allow a termination, and there are none.

3. If the termination is not preliminarily enjoined, Freedom Pharmacy is at risk of permanently losing customers, and its business will be all but destroyed.

4. More importantly, as a specialized and unique pharmacy in Orlando, Florida, ESI insured's and Freedom Pharmacy patients will be unable to obtain necessary prescriptions to maintain their health.

5. Immediate relief is required to prevent irreparable harm.

Parties, Jurisdiction, and Venue

6. Freedom Pharmacy is a Florida corporation with its principal place of business located at 3901 E. Colonial Drive, Orlando, FL 32803.

7. ESI is a Delaware corporation with its principal place of business at One Express Way, St. Louis, Missouri 63121.

8. ESI is a Pharmacy Benefit Manager ("PBM").

9. This Court has diversity jurisdiction pursuant to 28 U.S.C. §1332 because the amount in controversy exceeds $75,000, and the parties are citizens of different states.

10. Venue is proper in this District pursuant to 28 U.S.C. §1391 and because the Provider Manual requires litigation over the Provider Manual be venued in the Eastern District of Missouri. A copy of the Provider Manual is referenced as Exhibit "1", but not attached due to confidentiality concerns, but subject to a separate motion to file under seal.

Freedom Pharmacy's Delivery of Pharmacy Services and ESI's Ability to Interfere

11. Freedom Pharmacy provides traditional pharmacy and compounding services.

12. Freedom Pharmacy was founded many years ago and has provided and continues to provide high quality services while focusing on long-term patient relationships for special needs patients.

13. Freedom Pharmacy has and remains available and accessible and provides continuity of service.

14. Pharmacy Benefit Managers (PBM's) are an integral part of the delivery of healthcare benefits and third-party administrators.

15. PBM's, by way of contracts or employment relationships with insurance carriers, health benefit plan sponsors, or other third-party players, PBM's manage the prescription drug

coverage provided by the carrier, plan sponsor, or other third-party player. PBM's contract with pharmacies, or third-party pharmacy services administrative organizations (PSAO's), to provide prescription drugs to insureds and health plan members, and the process and pay claims for prescription drugs.

16. Upon information and belief, ESI is the nation's largest PBM. Together with Medco (now owned by ESI) and Caremark, these PBM's administer approximately 80% of the insured prescriptions and 90% of insured mail order prescriptions. Upon information and belief each of these companies has annual revenues exceeding $15 billion.

17. ESI and Medco manage drug benefits for over 200 million Americans. It is believed that this amounts to approximately 95% of Americans with prescription drug coverage.

18. By engaging in anti-competitive and other unlawful behavior, ESI and Medco became two of the three largest PBM's controlling all aspects of prescription drug benefit plans, including creating formularies of preferred medicines, negotiating with drug manufacturers for discounts and rebates, negotiating with pharmacies to establish retail networks for dispensing drugs, and establishing automated processes for determining (often called "adjudicating") coverage eligibility at the point of sale.

19. ESI also owns and operations its own mail order pharmacy to fill prescriptions directly and takes affirmative steps to direct the flow of prescriptions to its own pharmacy to increase market share, slow down the costs, and eliminate competition.

20. Pharmacies have no choice in the market but to acquiesce to ESI's demands or be effectively shut out of the market.

The Provider Agreement

21. In May 2014, ESI and Freedom Pharmacy entered into a written contract (the "Provider Agreement") pursuant to which Freedom Pharmacy became a participating provider of prescription drugs in ESI's network of pharmacies. A copy of the Provider Agreement will be supplemented, under seal, due to confidentiality concerns, as Exhibit "2" upon receipt.

22. Freedom Pharmacy is a Provider under the Provider Agreement that governs the relationship between Freedom Pharmacy and ESI.

23. The Provider Agreement allows ESI to terminate Freedom Pharmacy from its pharmacy network in specific instances. In that regard Section 4.2(c) provides for Immediate Termination in very specific instances as follows:

> (i) Provider ceases to be licensed by the appropriate licensing authority; (ii) Provides submits a fraudulent prescription drug claim or any information in support thereof; (iii) Provider is insolvent, goes into receivership or bankruptcy or any other action is taken on behalf of its creditors; (iv) Provider fails to comply with the claims submission and processing requirements as set forth in Section 2.3 or fails to comply with Section 2.4 of this Agreement or any of ESI's policies and procedures including, but not limited to, the Provider Manual and/or quality assurance and/or utilization review procedures; (v) no longer meets credentialing requirements; (vi) ESI determines that the Provider is dispensing Covered Medications in violation of any applicable law, rule and/or regulation; (vii) Provider is excluded from participating in any federal or state health care program; (viii) Provider fails to maintain insurance as required by Section 6.1 of this Agreement; (ix) Provider has not submitted a claim to ESI for ninety (90) calendar days; (x) Provider (or any Pharmacy) fails to comply with any audit or investigative request, including the provision of information, made by ESI or any Sponsor or their designee, within the time period stated in such request; (xi) a determination is made by ESI that Provider (or any Pharmacy) failed to document purchases or prescription drugs sufficient to support its claims for reimbursement to ESI; or (xii) ESI determines that Provider's continued performance of services poses a risk to the health, welfare or safety of any Member.

ESI's Termination of Freedom Pharmacy

24. In June 2016, ESI made the conclusory assertion that Freedom was a "Mail Order Pharmacy" rather than a "Retail Provider." A true and accurate copy of the ESI termination is attached hereto as Exhibit "3."

25. According to ESI "recent review of the Provider's claim activity" made ESI conclude that Provider was operating a mail order business. Based upon this and without regard for proper maintenance of all records, complete safety and security, proper billing, and safe services, ESI chose to immediately terminate Freedom Pharmacy as a Network Provider effective July 18, 2016.

26. Specifically, ESI noted that Freedom Pharmacy was prohibited from being a mail order pharmacy because it was a retail pharmacy and those terms, pursuant to the ESI classification are mutually exclusive. See Ex. 3.

27. Additionally, ESI alleged that Freedom Pharmacy mailed prescriptions to states where it was not licensed to dispense.

28. Despite ESI's complete reliance on the Provider Agreement and Network Provider Manual as the basis to exclude Freedom Pharmacy as a Provider in the ESI network, ESI contradicts the very terms of the relationship that provides a timeline of 30 days for Freedom Pharmacy and ESI to work in good faith toward a dispute resolution of the issues giving rise to the purported termination of Freedom Pharmacy.

29. However, before even having a discussion or entering into a good faith dispute resolution process, Freedom Pharmacy will be terminated from the network.

30. Moreover, the Florida Addendum to the Provider Manual requires (90) days notice for pharmacies, such as Freedom Pharmacy, that are Florida entities.

31. Despite request to extend the termination deadline to comply with these mandates, ESI declined and indicated that it would enforce the July 18, 2016 termination date.

32. Also, of great concern, it is believed that ESI has commenced issuing notices to Freedom Pharmacy patients advising that Freedom Pharmacy is out of network July 8, 2016 – ten (10) days prior to what was presented to Freedom Pharmacy.

33. Freedom Pharmacy has repeatedly met and satisfied all criteria under the Provider Agreement.

34. Freedom Pharmacy has repeatedly met and satisfied all requirements of ESI.

Irreparable Injury to Freedom Pharmacy

35. ESI's wrongful termination of Freedom Pharmacy will result in irreparable harm by putting at risk the lives of the many patients of Freedom Pharmacy serves.

36. Freedom Pharmacy provides services for many patients who depend upon their medications, coverage for which is supposed to be provided by ESI pursuant to the Provider Agreement.

37. ESI's termination of Freedom Pharmacy will result in a diversion of patients and Freedom Pharmacy will lose, overnight, revenue that will cause it to close its doors and terminates all employees.

38. Furthermore, Freedom Pharmacy's reputation in the industry will be permanently damaged. Freedom Pharmacy will have to report the termination of its contract with ESI and it is extremely likely that such termination will have a domino effect on Freedom Pharmacy's relationship with other PBM's, accrediting agencies, and industry players leading to the destruction of Freedom Pharmacy business for an entirely separate reason.

39. Freedom Pharmacy has no adequate remedy at law which compensated for the impending injury that ESI's actions will cause if the termination is permitted to go forward.

COUNT I

BREACH OF CONTRACT

40. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 40 of the Complaint.

41. Freedom Pharmacy and ESI have a relationship under the Provider Agreement that has been breached by ESI.

42. ESI's attempts to terminate Freedom Pharmacy from its networks of participating pharmacies is not warranted, proper, or permitted under the Provider Agreement and have violated due process.

43. The Provider Agreement also provides that ESI shall notify Freedom Pharmacy of any default under the contract; allow Freedom Pharmacy to cure any default; meet and confer regarding the dispute; and negotiate in good faith to resolve any discrepancy between the parties.

44. ESI failed to notify Freedom Pharmacy of any default under the Provider Agreement thereby negating ESI's opportunity cure said default.

45. ESI has not participated in any meet and confer or good faith negotiation as required by ESI's own contracts regarding the attempted termination of Freedom Pharmacy.

46. ESI's mandated diversion of Freedom Pharmacy's patients and the associated revenue in connection therewith is a breach of the implied duty of good faith and fair dealing.

47. Excluding Freedom Pharmacy from ESI's pharmacy provider network will deprive Freedom Pharmacy of its ability to provide prescription drugs to ESI members.

48. Freedom Pharmacy has fully performed all material obligations under the Provider Agreement.

49. As a direct and proximate result of ESI's breaches under the Provider Agreement as well as its Network Provider Manual, not attached as an exhibit due to confidential language, but available to file under seal, Freedom Pharmacy has been and will continue to be damaged.

50. ESI does not have any cause to terminate Freedom Pharmacy in this case.

51. Any termination without cause requires a minimum of **90** days written notice in the State of Florida pursuant to the Addendum to the Provider Manual.

52. The harm to Freedom Pharmacy from ESI's termination will be irreparable as exhibiting customers will be forced to locate new pharmaceutical companies on short and inadequate notice.

53. Once Freedom Pharmacy's customers are forced to find other pharmacies it is unlikely that the customers will return and they will be permanently lost.

54. Interruptions in Freedom Pharmacy's ability to supply specialized, compounded prescriptions to its existing customers will harm its reputations among physicians, health care providers, and potential customers.

55. Termination of the Provider Agreement is also likely to result in the loss of business from existing and potential customers as physicians and health care providers will refer patients to a pharmacy that can supply the needs of parties who are covered under ESI's pharmacy benefit plan.

56. Termination from ESI's network will render Freedom Pharmacy insolvent and Freedom Pharmacy will be forced to close its doors and lay off employees.

COUNT II

BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

57. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 56 of the Complaint.

58. ESI has an obligation to carry out the Provider Agreement in good faith and deal fairly with Freedom Pharmacy.

59. Upon information and belief, ESI is enforcing a termination against Freedom Pharmacy on inaccurate conclusions and without full evaluation of all materials.

60. Upon information and belief, despite repeated requests, ESI has refused to discuss the instant claimed issues with Freedom Pharmacy.

61. Upon information and belief, ESI will divert Freedom Pharmacy patients and revenue to ESI's own specialty pharmacy or to a pharmacy that is more economically advantageous to ESI.

62. ESI is not acting on good faith and using improper and inaccurate assertions, conclusions, and information to terminate Freedom Pharmacy.

63. Freedom Pharmacy is damaged by ESI's actions.

COUNT III

UNJUST ENRICHMENT

64. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 64 of the Complaint.

65. Upon information and belief, ESI is improperly terminating Freedom Pharmacy's status as an ESI provider.

66. ESI will either directly gain patients and revenue through wholly or partially owned pharmacies, will divert patients to pharmacies where ESI has a more favorable Provider Agreement, or will interfere so directly that patients will be unable to obtain their prescriptions thereby saving ESI monies.

67. Freedom Pharmacy has invested in these patient relationships and ESI's attempts to poach, divert, and eliminate these patients is self-serving and at the expense of Freedom Pharmacy.

68. ESI is not entitled to nor deserving the business from Freedom Pharmacy or any financial gain or incentive it can manipulate as a result of eliminating Freedom Pharmacy as a Provider in the ESI network.

69. It is inequitable for ESI to accept and retain the benefit of poaching, diversion or eliminating member usage of Freedom Pharmacy.

70. As a result of ESI's actions, ESI will be unjustly enriched by the business Freedom Pharmacy has developed and which ESI seeks to poach, divert and/or eliminate.

COUNT IV

TORTIOUS INTERFERENCE

71. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 70 of the Complaint.

72. ESI has knowledge of the business relationships between Freedom Pharmacy and its patient base.

73. ESI has knowledge of Freedom Pharmacy's expectancy that it would maintain its business relationship with its patient based and the fact that Freedom Pharmacy invested substantial resources in developing and maintaining those relationships.

74. Despite having knowledge of these business relationships, ESI has tortiously interfered with such business relationships, without justification or excuse.

75. Further, upon information and belief, ESI intends to further tortiously interfere with Freedom Pharmacy's contractual and business relationships, in a manner both willful and intentional, without justification or excuse.

76. As a result of the actions of ESI, Freedom Pharmacy has been injured and faces irreparable harm.

77. Freedom Pharmacy is threatened with losing or has lost its business, income, viability, and/or goodwill.

78. ESI's action have and continue to cause damage to Freedom Pharmacy.

COUNT V

DECLARATORY JUDGMENT

79. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 78 of the Complaint.

80. ESI and Freedom Pharmacy have a valid Provider Agreement governing the relationship of the parties.

81. There is a dispute as to the terms, obligations, duties, rights, and responsibilities under the Provider Agreement.

82. Freedom Pharmacy respectfully requests that this Court declare the parties' rights and obligations pursuant to the Provider Agreement.

COUNT VI

INJUNCTIVE RELIEF

83. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 82 of the Complaint.

84. In violation of the Provider Agreement, ESI has purported to terminate Freedom Pharmacy as an ESI provider effective July 18, 2016.

85. ESI's wrongful termination has, and unless restrained by this Court, will continue to cause irreparable injury to Freedom Pharmacy's business, including, but not limited to customers'' needs for prescriptions, the sustainability of the business, ongoing employment for employees, service provider relationships, and the reputation of the pharmacy for which there is no adequate remedy at law.

86. ESI's wrongful conduct proximately caused loss to Freedom Pharmacy in an amount to be determined at trial as well as an amount that cannot be financially recovered and for which the only recovery is injunctive relief.

COUNT VII

BREACH OF CONTRACT

87. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 86 of the Complaint.

88. ESI's failure to pay monies due and owing to Freedom Pharmacy is a violation of the contract between the parties.

89. ESI's clawback of monies paid to Freedom Pharmacy is a violation of the contract between the parties.

90. Monies were due and owing to Freedom Pharmacy.

91. ESI's failure to pay monies and withhold funds is a violation of the agreement.

92. Freedom Pharmacy has been and continues to be damaged by ESI's actions.

COUNT VIII

TORTIOUS INTERFERENCE

93. Freedom Pharmacy incorporates by reference as though fully set forth herein paragraphs 1 through 92 of the Complaint.

94. ESI's exclusion of Freedom Pharmacy as a Provider interferes with patient choice to obtain prescriptions from any source or medium.

95. Patient rights are protected by statute and ESI interference in the patient's choice of pharmacy and medium of receipt is an interference in the patient – pharmacy relationship.

96. ESI does not have any justification to remove Freedom Pharmacy as a provider.

97. Freedom Pharmacy has and continues to sustain damages based upon ESI's action.

WHEREFORE, Plaintiff Freedom Pharmacy respectfully requests that this Court enter judgment in its favor against Defendant Express Scripts, Inc. and preliminarily enjoin Express Scripts, Inc. as follows:

A. From termination of the Provider Agreement and removal of Freedom Pharmacy as a participating provider for ESI members;

B. From contacting Freedom Pharmacy's patients in an attempt to transition them away from Freedom Pharmacy;

C. From any interference with Freedom Pharmacy's business relationships with patients;

D. An award to Freedom Pharmacy for damages suffered, including, but not limited to lost profits, in an amount to be proven at trial;

E. A declaration of the rights and responsibilities of the parties under the Provider Agreement;

F. An award of attorneys' fees and costs of this action;

G. An award of compensatory and punitive fees;

H. An award of pre-judgment interest;

I. Grant such other further relief as the Court deems just and equitable.

J. For compensatory and such other relief as deemed available by this Court on Counts VII and VIII.

JURY DEMAND

Plaintiff Freedom Pharmacy hereby requests a trial by jury on all issues.

Respectfully submitted,

/s/ Anthony J. Calamunci
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 17th day of October, 2016, the foregoing was filed electronically with the Clerk of Court, to be served by operation of the Court's electronic filing system.

/s/ Anthony J. Calamunci
Anthony J. Calamunci